ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996 Open Video Systems	CS Docket No. 96-46

REPLY COMMENTS

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Cable Telecommunications Association of Maryland, Delaware and the District of Columbia;
New Jersey Cable Telecommunications Association;
Ohio Cable Telecommunications Association;
South Carolina Cable Television Association;
Tennessee Cable Television Association;
Texas Cable & Telecommunications Association;
Wisconsin Cable Communications Association

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Pursuant to the Notice of Proposed Rulemaking ("NPRM") released by the Commission in the above captioned proceeding, American Cable Entertainment; Bresnan Communications Co., Ltd.; Greater Media, Inc.; TeleScripps Cable Co. d/b/a North DeKalb Cable; Cable Telecommunications Association of Georgia; Cable Telecommunications Association of Maryland, Delaware and the District of Columbia; New Jersey Cable Telecommunications Association; Ohio Cable Telecommunications Association; South Carolina Cable Television Association; Tennessee Cable Television Association; Texas Cable & Telecommunications Association; Wisconsin Cable Communications Association ("Commenters"), hereby submit the following reply comments.[1]

[1] TeleScripps Cable Co. d/b/a North DeKalb Cable ("Scripps") was not a party to Commenters' initial Comments. Scripps, however, now joins these Reply Comments to respond to specific allegations directed at Scripps in the Joint Comments filed by Bell Atlantic, BellSouth, GTE, Lincoln Telephone, Pacific Bell, and SBC Communications.

INTRODUCTION AND SUMMARY

In response to its NPRM, the Commission has received numerous comments from parties representing varied interests within the video marketplace. In general, the parties' comments presented easily predicted positions of the different groups. For example, the broadcasters asserted that they must receive special treatment, such as special channel positions and reduced rates. And municipal interests asserted that they must be allowed to determine and impose the public, educational, and governmental access requirements for open video systems ("OVSs"). It should come as no surprise, therefore, that the local exchange carriers ("LECs"), who will likely be the first providers of OVS, chimed in with a detailed regulatory — or more appropriately *deregulatory* — wish-list.

From the time of the first suggestion of a video delivery system that would require the LECs to provide transport capacity to unaffiliated programmers on an "open" basis, the LECs have resisted such a scheme, attempting instead to recraft that model into an unfranchised cable system.[2] In their comments in this proceeding, the LECs continue to chart that course. In their comments, the LECs assert that the Commission should adopt a hands-off approach, leaving the LECs free to operate under their "good faith business judgement." They assert that the Commission must adopt rules that are so lenient that a cable operator faced with the prospect of

[2] In the original video dialtone proceeding (Docket No. 87-266), the LECs expressed the view that without the ability to provide programming directly to subscribers over their facilities, they would have little or no incentive to deploy video transport facilities for common carrier purposes. *See, e.g.*, Bell Atlantic comments at 5-6; BellSouth comments at 44; Southwestern Bell (now SBC) comments at 28-29; *see also* GTE comments at 21 ("Video dialtone by itself is not sufficient to stimulate substantial investment in broadband facilities.").

competing with such an entity would have little choice but to convert to OVS itself, lest it be put out of business by its unregulated competitor. The LECs' proposal is entirely unacceptable, and in conflict with the explicit provisions of the 1996 Act.[3] Congress has provided explicit instructions regarding what level of regulation, and deregulation, are to be imposed on OVS operators.[4] The Commission is not free to disregard, modify, or forebear from imposing those explicit instructions.

One critical regulation that the LECs seek to have foregone or modified is the Act's explicit requirement that OVS operators be prohibited from discriminating among video programming providers with regard to carriage on the system. The LECs ask the Commission to provide them with "flexibility" to control who is allowed on the system, how much capacity is allotted, and what channel positions are assigned. Particularly, the LECs seek to deny capacity to multichannel video programming distributors ("MVPDs"). The control the LECs seek, however, is inconsistent with both the "openness" of an OVS, and the Act's prohibition on discrimination. Indeed, the LECs' request would ultimately transform OVS into a "closed" cable system, but without the franchise and other regulatory burdens imposed on cable operators. The Commission may neither encourage nor allow OVS to be redefined as a "closed" system. The LECs are free to become cable operators if they wish; OVS, however, must be an entirely open system in order to justify the differing regulatory treatment detailed in the Act.

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[3] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act" or "Act").

[4] 1996 Act § 653.

The LECs also seek to avoid the 1996 Act's requirement that the Commission regulate the rates charged for carriage. There is no factual support, however, for such deregulation. LEC OVS operators will have monopoly power in the market for carriage on their open video systems. Accordingly, the Commission cannot rely on "market" forces to ensure the rates charged for carriage are just and reasonable. Moreover, imposing such rate regulation is entirely consistent with the Congressional statement that OVS operators are not to be subject to Title II-like regulation. The Commission has numerous non-Title II rate regulation models from which to choose in ensuring the reasonableness of rates.

Finally, as an extension of their quest to control the identity of programmers granted carriage on the system, the LECs assert that they must be allowed to deny carriage to local cable operators. Beyond the fact that such a denial would constitute actionable discrimination under the 1996 Act, the LECs' "policy" arguments against such carriage are baseless. The LECs make assorted conclusory and groundless accusations about the purported conduct of one local cable operator, Commenter Scripps, who has sought capacity on BellSouth's video dialtone system. As demonstrated below, however, those accusations are unfounded and untrue, and raise greater questions about the improper conduct of BellSouth.

The Commission is engaged in a critical act of setting the stage for the entry of a new video competitor. While its time-frame is abbreviated by the 1996 Act, the Commission must give careful thought to the short and long-term consequences of the regulations that will govern a complex set of relationships between LECs, cable operators, and programmers. The

Commission must not allow itself to be pressured into a hands-off approach simply for the sake of expediency.

I. THE COMMISSION MUST NOT FAVOR OVS OVER TRADITIONAL CABLE TELEVISION SYSTEMS

In the 1996 Act, Congress provided several options for the provision of video programming to subscribers, one of which is the new construct, OVS.[5] Neither the plain language nor the legislative history of the 1996 Act, however, indicate that Congress intended to promote the use of one delivery vehicle over the others. Rather, the 1996 Act was meant to provide LECs with the opportunity to choose the particular scheme that best suited the particular markets they sought to enter. For example, LECs, and others, might determine that a large, urban market would be best suited to the OVS structure, or that rural areas, with their higher per-subscriber costs for wireline facilities, would be best suited to wireless approaches, like DBS or MMDS. In the eyes of Congress and the 1996 Act, OVS, cable television, and wireless delivery options are all equally acceptable methods of advancing competition. OVS was not intended to be a "blessed" option that all providers should be funneled toward.

Yet, in their comments, the LECs assert that the Commission must make OVS a regulatory favorite.[6] The LECs assert that the Commission should adopt an approach in

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[5] 1996 Act § 651.

[6] Six major LECs, Bell Atlantic, BellSouth, GTE, Lincoln Telephone, Pacific Bell, and SBC Communications, filed comments jointly in this proceeding. Accordingly, in these Reply Comments, Commenters will refer to that joint filing using the general phrase "the LECs' comments." If Commenters intend to refer to any particular LEC's comments, such as U S West,

implementing the OVS sections of the 1996 Act whereby the Commission only adopts rules that would "make open video systems an attractive alternative for cable operators."[7] That "litmus test" for regulation, however, is without statutory support and is inadvisable from a policy standpoint.

The thrust of the LECs' "litmus test" is that the Commission must implement OVS regulations in such a deregulatory manner that it would be economically imprudent, if not impossible, for a cable operator to continue operating under the weighty burden of Title VI and local franchising, rather than switch to OVS. The LECs are saying that the Commission should favor OVS with a less burdensome and more favorable regulatory scheme. The inevitable outcome of which would be to create a "competitor" with whom traditional cable operators could not compete, and thus putting those operators out of business or forcing them to join as OVS providers. First, as discussed above, the 1996 Act does not indicate that Congress intended for OVS to supplant traditional cable television systems. OVS, like wireless, is meant to be technologically and regulatorily different from traditional cable, but still on a competitively level playing field. Second, Section 653 explicitly provides the extent of regulation, and deregulation, that Congress intended to apply to OVSs.[8] Section 653(c), "Reduced Regulatory Burdens for Open Video Systems," prescribes the particular level of reduced regulatory burden with which Congress intended to "favor" OVS. Sections 653(a) and 653(b), by contrast, prescribe the

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that filed separately, Commenters will explicitly identify the LEC to which they refer.

[7] LEC Comments at 5.

[8] 1996 Act §§ 653(a), (b), (c).

regulations the Commission must impose. For example, the Commission *must* prescribe regulations that "*ensure*" that rates, terms, and conditions for carriage on an OVS are just and reasonable and not unjustly or unreasonably discriminatory.[9] Such requirements do not provide the Commission with room to adopt regulations based on whether they will be less burdensome than those imposed on cable operators. Moreover, as Commenters demonstrated in their initial comments, the Commission cannot and should not forebear from enforcing the regulations imposed by Section 653.[10]

The LECs' opening gambit is a cynical attempt to manipulate the Commission into making OVS an unfranchised cable system, free from Commission oversight, and ripe for cross-subsidization and abuse. The Commission must reject the anticompetitive initiatives advanced by the LECs.

II. THE COMMISSION MUST ADOPT RULES ENSURING THAT OPEN VIDEO SYSTEMS REMAIN TRULY "OPEN" AS INTENDED BY CONGRESS

While Congress chose to repeal the Commission's video dialtone rules, in adopting the new legislative construct "open video systems," Congress clearly intended to retain the critical "open" nature of the systems introduced by the video dialtone scheme. Yet, in their comments, the LECs attempt to convince the Commission that the "openness" of open video systems is a matter for interpretation. The LECs would have the Commission's OVS rules provide them broad

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[9] 1996 Act § 653(b)(1)(A).

[10] Comments of American Cable Entertainment, *et al.* ("Comments") at 6-7.

flexibility to exercise their "good faith business judgment" in determining who is allowed on the system, what channel positions they are assigned, and what price they are charged.[11] The "flexibility" the LECs seek, however, is actually an attempt to make OVS into an unfranchised, unregulated cable system. The proposals advanced by the LECs, and the positions they propound on particular issues would, if adopted, destroy the "openness" of OVS, and allow the LECs to exert the same editorial control as traditional cable operators, but without a cable operator's regulatory burdens. The Commission must resist this path, and ensure the "open" nature of OVS, as required by the 1996 Act and to support its differing regulatory treatment.

The focal point of Congress' commitment to requiring truly "open" video systems is the prohibition on discrimination among video programming providers with regard to carriage on an OVS system.[12] Unlike other anti-discrimination provisions in the Communications Act, the prohibition on discrimination by OVS operators with regard to carriage is absolute; it contains no "reasonabness" or "justness" modifier.[13] As Commenters explained in their initial comments,

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[11] LECs' Comments at 7, 8, 21.

[12] 1996 Act § 653(b)(1)(A).

[13] 1996 Act § 653(b)(1)(A). The prohibition on discrimination with regard to *carriage* does not include a "reasonableness" gloss. *See* LECs' Comments at 11. The second clause of Section 653(b)(1)(A), which concerns rates, and which follows the prohibition on discrimination with regard to carriage, explicitly includes the traditional "just and reasonable, and not unjustly or unreasonably discriminatory" modifier. This demonstrates that Congress did not intend for the prohibition on discrimination with regard to carriage to include such a modifier. If Congress had intended to allow OVS operators to exercise "reasonable" or "not unjust" discrimination with regard to carriage, it would have explicitly so stated, as it did regarding rates.

The explicit requirements of Section 653(b)(1)(A) also prohibit the adoption of the LECs' proposed "*prima facie* discrimination showing." LECs' Comments at 10. The LECs' proposed standard attempts to interject numerous lenient standards to modify the Act's explicit terms. For

this prohibition on discrimination prohibits OVS operators from exercising control over who may obtain carriage on their systems, how many channels on the system particular parties are allocated, and which channel positions programmers are assigned, as each of those activities inherently would require the OVS operator to discriminate among programmers.[14] In their comments, however, the LECs assert that they must have control over all of those activities.[15]

A. Open Video Systems Must Be Fully Open To Multichannel Video Programming Distributors ("MVPDs")

The first attack the LECs make is on the requirement that an OVS operator permit carriage of MVPDs.[16] The LECs assert that "[n]either Section 653 nor the legislative history expresses any congressional intent to ensure that open video systems bear the added costs of accommodating multiple MVPDs. Section 653 merely requires that multiple video programming providers be permitted to 'select' video programming for carriage on the system."[17] In footnote 19, they assert that Section 653 only requires them to carry "video programming providers," not MVPDs, which are explicitly defined by Section 602 of the Cable Act, and therefore, the LECs

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example, in order to be actionable, the LECs would require that discriminatory treatment was "intentional," that the treatment was "substantially" different from the treatment of "similarly situated" programmers, that the treatment was "commercially unreasonable," and that the complainant suffered "actual and *substantial* commercial harm." LECs' Comments at 10. The Act, however, does not support the imposition of any such modifying standards.

[14] Comments at 8-15.

[15] LEC Comments at 11-21.

[16] LECs' Comments at 11-12.

[17] LECs' Comments at 12.

assert, somehow not assured carriage.[18] This, they assert, along with the statement in Section 653(b)(1)(B) that Congress did not intend "to limit the number of channels that the carrier and its affiliates may offer to provide directly to subscribers," provides OVS operators "wide latitude to design programming packages and assign use of channels on the system."[19] Further, the LECs assert these provisions provide for "sharing of editorial control over the system. . . ."[20]

Of course, the LECs are incorrect. The use of the term "video programming providers" rather than "MVPDs" does not exclude MVPDs. MVPDs *are* video programming providers. MVPDs simply provide multiple channels of video programming. Indeed, the LECs' comments themselves demonstrate the fallacy of their argument. In their comments, the LECs point to Section 653's permission for operators to "carry on only one channel any video programming service that is offered by more than one video programming provider" as support for their control over the capacity of the system.[21] While that Section does not provide for LECs to control the content of their systems' capacity,[22] the provision does demonstrate that Congress

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[18] LECs' Comments at 12, n.19.

[19] LECs' Comments at 12-13.

[20] LECs' Comments at 12, n.19.

[21] LECs' Comments at 13.

[22] Allowing OVS operators some small measure of control over the efficient use of their systems' capacity does not indicate congressional intent to provide OVS operators total control over their systems' content or even capacity. Indeed, if the 1996 Act provided for such control by the OVS operator, then a statement specifically *allowing* channel sharing would be unnecessary and meaningless. The Commission must interpret the Act so as to give every provision meaning. The channel sharing Section is an exception to the general prohibition on OVS operators controlling content and capacity, not a grant of broad control.

foresaw the carriage of MVPDs on OVSs. If there were no providers of multiple channels of programming (*i.e.*, MVPDs), there would be no "video programming service . . . offered by more than one video programming provider," as each video programming provider would only have one channel.[23]

B. The LECs Have Already Exposed Their Intention To "Close" Their OVSs If The Commission's Regulations Are Not Strong Enough

The more troubling matter raised by the LECs' comments is their conception of an open video system. From their focus on the terms "video programming providers" and "select video programming," it is clear the LECs conceive of a system that is not at all open. Under the LECs' interpretation, an OVS would involve the LEC OVS operator "sign[ing] up video programming providers . . ."[24] and then "assign[ing] programming to analog or digital channels as they deem necessary to provide marketable, competitive programming packages."[25] "Video programming providers," under the LECs conception, apparently would be entities, such as

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[23] Theoretically, it would be possible in a scheme were only video programming providers offering one channel of programming were allowed on the systems, for several of those programmers to have contracted to provide the same channel of programming (*e.g.*, ESPN). It would be economically absurd, however, to believe that all of those programmers were going to compete for subscribers using the same channel — shared or not. Indeed, that assumes that the individual programming providers will have direct relationships with subscribers. If, as the LECs assert, the individual programming providers will only deal with the OVS operator, who will provide them "carriage" (in the same manner a cable operator carries a channel), it is even less likely that the LEC would engage several providers offering the same schedule of programming.

The LECs' thinly veiled attempt to manipulate OVS into an unfranchised, unregulated cable system disintegrates quickly when subjected to minimal scrutiny.

[24] LECs' Comments at 14.

[25] LECs' Comments at 18-19.

ESPN, HBO, or broadcast networks, who would "select" the programming to be carried on their channel (*i.e.*, "select" to show a particular movie from 8pm to 10pm).[26] The LEC OVS operator would then "share" editorial control over the system[27] by deciding to which channel the programming would be assigned and by bundling multiple channels together. Such activities, however, are precisely what traditional cable operators do. The LECs are proposing to exercise the editorial control of cable operators, but without the same regulatory burdens.[28]

The LECs' comments on specific issues further demonstrate that if the Commission's regulations provide too much "flexibility," the LECs will simply operate their systems like closed cable systems, but without the added regulatory burdens.

1. LECs Must Be Prohibited From Packaging Channels

In their Comments, the LECs assert that OVS operators must be allowed to assign channels to provide competitive packages of programming.[29] This proposal is inconsistent with both the absolute prohibition on OVS operators discriminating among programming providers,

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[26] The LECs assert that Section 653 "merely requires that multiple video programming providers be permitted to 'select' video programming for carriage on the system."

[27] LECs' Comments at 12, n.19.

[28] The LECs' are similarly inaccurate when they assert that "unless the open video system itself can be a viable competitor, there will be neither inter-system competition nor intra-system competition." LECs' Comments at 13. OVS is not necessary for the advancement of inter-system competition. Initially, inter-system competition already exists between cable operators, SMATV operators, and wireless providers, such as DBS. The LECs, however, could provide *further* inter-system competition by choosing to construct competing cable systems rather than an OVSs.

[29] LECs' Comments at 19.

and the limitation on OVS operators exercising editorial control over other parties programming that is inherent in an "open" video system. Discrimination among programmers is inherent in the choice of channel placement involved in such "packaging." Moreover, selecting programmers, and therefore programming, to appear on the system, and selecting where on the system they will appear are the editorial activities of a cable operator. While it would be proper for the OVS operator's programming affiliate to engage in such "discriminating", editorial activities with regard to its block of channels (presumable 1/3 of the system), the system would not be "open" if the OVS operator were permitted to exercise such control over the entire compliment of channels on the system.

The LECs contend that they must have such control to "ensure that their systems offer customers the services they expect."[30] The problem with the LECs' assertion is that they assume customers "expect" cable service (*i.e.*, packages and tiers of programming offered by a single operator). The key to the enactment of the OVS concept, however, was to promote innovation in the provision of services. If the LECs merely wish to continue providing consumers what they have come to "expect," then the LECs can become cable operators.

2. The Commission Cannot Adopt The "Good Faith Business Judgment" Standard For Evaluating OVS Operators' Conduct

In their comments, the LECs repeatedly assert that the Commission should adopt rules that allow the LECs to operate freely according to their "good faith business judgement."[31]

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[30] LECs' Comments at 11.

[31] *See, e.g.*, LECs' Comments at 8.

Such a standard for measuring the conduct of LEC OVS operators is unsupported by the statute and would place the public interest at risk. As demonstrated above, the 1996 Act explicitly requires the Commission to prescribe rules regarding certain matters. The Act does not include in those provisions the option for the Commission to rely on the "good faith business judgement" of OVS operators. Indeed, with regard to carriage on the system, the Act requires that OVS operators be prohibited from discriminating among video programming providers. The Act's explicit command does not leave room for OVS operators' "business judgement" as a defense to discrimination.

Even if the Commission were authorized to adopt the "good faith business judgement" standard, it should not do so, as it would impermissibly jeopardize the public interest. The "business judgement" rule has historically been applied in judging the actions of corporate officers and directors.[32] The rule is widely recognized as extremely lenient.[33] Indeed, the rule prevents courts from examining the merits of corporate directors' decisions as long as the directors were "informed" and acted in "good faith" and with an "honest belief" that their action is in the best interest of the corporation.[34] While such a lenient standard may be considered sufficient to protect corporate shareholders, it is insufficient to satisfy the Commission's duty to protect the public interest. Indeed, inherent in the standard is the assumption that the person was acting in the best interests of the corporation — not the public.

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[32] R. Franklin Balotti and Jesse A. Finkelstein, *The Delaware Law Of Corporations and Business Organizations*, § 4.6 (1988).

[33] *Id.*

[34] *Id.*

C. The Commission Must Not Allow OVS Capacity Allocation To Be Frozen For Years

In their comments, the LECs and U S West argue that to promote stability, OVS channel allocations must be "frozen" for a set period of time.[35] Both the LECs and U S West argue that the minimum time must be at least 3 years, and preferably 5 years.[36] While Commenters recognize that business certainty probably requires that programmers accessing an OVS receive assurance that they will not be forced constantly to change their allocation or re-apply for channels, 3 years, and certainly 5 years, is too long to freeze OVS channel allocations.

The video programming market is highly competitive. New programming offerings are constantly being introduced, many of which fail. To such a vibrant and ever-changing market, 3 years is an eternity to wait for the opportunity to obtain carriage on an OVS. Yet, the LECs assert that they must be allowed to provide capacity only to programming providers who already have contracts to provide programming over the channels, thus effectively requiring those programmers to have multi-year affiliation contracts to obtain carriage.[37] But, if the programmers and packagers on an OVS are locked into programming contracts for 3 years, and are unable to obtain additional channels during that time, they will be unable to offer new programming channels access to subscribers.[38] Such a situation would substantially harm the

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[35] LECs' Comments at 21; U.S. West Comments at 12.

[36] LECs' Comments at 21; U.S. West Comments at 12.

[37] LECs' Comments at 24.

[38] This demonstrates why the Commission must reject the LECs' assertion that they only be required to provide capacity to programmers with preexisting contracts to provide programming. LECs' Comments at 24. If programmers and packagers were required to have 3 year contracts

programming industry. In the cable leased access context, the Commission has acted to assist independent programmers. It should also do so with regard to OVS.

Indeed, competitive equality demands that the Commission require OVS operators to provide capacity on intervals as small as one-half hour. As Commenters explained in their initial comments, Congress did not explicitly impose commercial leased access requirements on OVS operators because Congress recognized that "open" video systems would already be available to programmers on the same terms as cable commercial leased access.[39] In recent orders regarding commercial leased access, the Commission has held that in order to provide a genuine outlet for independent programmers, cable operators must make channel capacity available on increments of as little as one-half hour.[40] The Commission held that since neither the Section imposing commercial leased access nor the legislative history indicated any reason to prevent part-time access, the Commission could require such a requirement.[41] For the same reasons, the Commission should impose the same requirement on OVS operators. Allowing OVS

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with particular programming providers before they could even request capacity, OVS capacity would be unnecessarily "frozen." Moreover, requiring such long-term programming commitments would prevent many, if not all, programmers from seeking capacity. Of course, that is to the LECs' advantage.

[39] Comments at 15.

[40] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Leased Commercial Access*, Order On Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-122, ¶¶ 46-47 (released Mar. 29, 1996) ("Leased Access Order").

[41] Leased Access Order, ¶ 46.

operators to impose multi-year lease minimums will serve as an impediment to the development of independent programmers, and will essentially close OVSs.[42]

III. THE COMMISSION MUST IMPOSE COST ALLOCATION AND RATE RULES

As we, and other commenters,[43] demonstrated in initial comments, the 1996 Act mandates that the Commission impose regulations ensuring that the rates OVS operators charge programmers for carriage are just and reasonable, and not unjustly or unreasonably discriminatory.[44] Commenters demonstrated that the Commission could not satisfy that legislative mandate by relying on "the market" or minimum take rates by unaffiliated programmers.[45] In addition, Commenters demonstrated that the 1996 Act requires the Commission to adopt cost allocation rules to prevent cross-subsidization of OVS by regulated telephone service revenues.[46] Not surprisingly, in their Comments, the LECs assert that the Commission should not impose any rules regulating OVS carriage rates or cost allocations.[47] The LECs' arguments are without support and should not be adopted.

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[42] If the Commission chooses not to impose half-hour increments, then it should prohibit OVS operators from requiring minimum lease periods in excess of 6 months, or at most 1 year.

[43] *See* NCTA Comments at 17-27.

[44] 1996 Act § 653(b)(1)(A).

[45] Comments at 20-22.

[46] Comments at 21. Commenters support the cost allocation and pricing mechanisms proposed in the Comments of the National Cable Television Association and the declaration of Leland Johnson, Ph.D., attached thereto.

[47] LEC's Comments at 22; US West Comments at 4.

The LECs' first baseless argument is that because Congress expressed an intention that OVS not be subject to Title II-like regulations, the Commission cannot "promulgate detailed rules governing pricing."[48] NCTA properly addressed this argument in its initial comments. NCTA pointed out that the Commission has imposed a rate regulation scheme on cable operators pursuant to Title VI, which is neither common carrier regulation nor Title II-like.[49] Similarly, the Commission has previously regulated the rates cable operators charge entities seeking leased access on a commercial basis.[50] The LECs' argument, therefore, is groundless. The Commission should not allow itself to be swayed from its statutorily mandated imposition of regulations on the rates charged for carriage by baseless allusions to Title II.

The LECs' second argument is that OVS operators will not possess market power, and therefore should not be rate regulated.[51] Again, NCTA properly addressed this argument in its initial comments. As NCTA demonstrated, Section 653 of the Act requires that rates charged by OVS operators *for carriage on the system* are required to be just and reasonable.[52] The relevant inquiry, therefore, is not into OVS operators' market power with respect to end-user subscribers, but rather, the Commission must evaluate OVS operators' market power with respect to unaffiliated programmers seeking capacity on the OVS. In that regard, OVS operators will

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[48] LECs' Comments at 22.

[49] NCTA Comments at 18.

[50] 47 C.F.R. § 76.701.

[51] LECs' Comments at 22-23.

[52] NCTA Comments at 18; 1996 Act § 653(b)(1)(A).

have market power over a bottleneck facility. Initially, there will likely only be one OVS operator in an area. Accordingly, that operator will have monopoly market power over the market for carriage on OVSs. Moreover, OVS operators will have a strong incentive to dissuade unaffiliated programmers from obtaining capacity, as that will leave more capacity for the OVS operator's programmer-affiliate. Accordingly, OVS operators will likely charge excessively high rates, to dissuade unaffiliated programmers from seeking capacity. And as we noted in our initial comments, if allowed to freeze the OVS capacity for several years after the initial enrollment period, as they propose, OVS operators could potentially monopolize the capacity on their systems for use by their affiliates.[53] Or, as NCTA points out, OVS operators could impose a price "squeeze" by charging unaffiliated programmers excessively high carriage rates, while charging end-user subscribers of its affiliate's service low rates.[54]

The Commission cannot ignore its statutory mandate to "ensure" that rates charged for carriage on an OVS are just and reasonable, and not unjustly or unreasonably discriminatory. And as demonstrated above and in comments filed by other parties, the market will not ensure that such rates meet that standard. Accordingly, the Commission must adopt rules regulating the rates charged by OVS operators for carriage on their systems.

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[53] Comments at 21.

[54] NCTA Comments at 18.

IV. OVS OPERATORS MUST BE PROHIBITED FROM DENYING CABLE OPERATORS CARRIAGE ON THEIR SYSTEMS

In their initial comments, Commenters demonstrated that Section 653 requires that cable operators be allowed to obtain capacity on OVSs pursuant to the same rates, terms, and conditions as any other video programming provider.[55] Other commenters similarly pointed out that allowing cable operators to obtain capacity on OVSs would be consistent with the 1996 Act and the public interest.[56] In the LECs' comments, however, they assert that OVS operators should be allowed to deny capacity to cable operators.[57] The LECs assert that the Commission should "presume conclusively that such refusals are reasonable. Otherwise, incumbent cable operators will be able to interfere with the successful operation of competing open video systems."[58]

The LECs' assertion is conclusory and without support, and conflicts with the mandates of the 1996 Act. First, a presumption of reasonableness would not insulate an OVS operator from liability for discrimination under Section 653(b)(1)(A). As Commenters have repeatedly demonstrated, it is irrelevant whether an OVS operator's refusal to carry any programmer, including a cable operator, is "reasonable." Congress chose not to allow any

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[55] Comments at 22-23. Commenters also demonstrated that cable operators must be permitted to become OVS providers. Comments at 22-23. Most other comments support that position. *See, e.g.,* LECs' Comments at 28.

[56] NCTA Comments at 27-31.

[57] LECs' Comments at 15; *see also* U S West Comments at 12-13. US West, like the other LECs, tries to argue that the phrase "video programming provider" is a special term that excludes cable operators from carriage. US West Comments at 13. "Video programming provider," however, is not defined by the Act. But cable operators clearly provide video programming, and thus fall within Section 653(b)(1)(A)'s protection.

[58] LECs' Comments at 15.

discrimination with regard to carriage. If Congress had intended to allow "reasonable" discrimination with regard to carriage, it would included language to that effect, as it did with regard to other terms. Refusing carriage to a cable operator would constitute discrimination against a video programming provider with respect to carriage, and would therefore be a violation of Section 653(b)(1)(A).

Second, the allegations made by the LECs regarding the carriage of cable operators on video dialtone systems, in particular "[t]he incumbent cable operator in BellSouth's video dialtone trial area," are conclusory and without support.[59] The cable operator referred to in the LECs' comments, TeleScripps Cable Co. d/b/a North DeKalb Cable ("Scripps"), has joined the Commenters in submitting these reply comments, and directly addresses the unsubstantiated and untrue accusations leveled against it.

When BellSouth obtained Commission authority to undertake a technical and market trial of video dialtone facilities in DeKalb County, Georgia, Scripps, the franchised cable operator in the area, recognized an opportunity to explore new and innovative service offerings that it did not have capacity to provide on its own system at the time. By using the capacity offered on an open video dialtone system, Scripps would be able to gain marketing information regarding new services and the needs of consumers, which it could then use to plan long-term changes in its system. In return for its desire to explore the new technologies and services, Scripps has become the object discriminatory treatment and unfounded accusations by BellSouth.

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[59] LECs' Comments at 15.

In their comments, the LECs assert that Scripps' "presence as an enrolled programmer during preparation for the trial has greatly increased the difficulty of creating and maintaining a coalition of enrolled programmers for development of a competitive retail offering. Moreover, its participation has greatly complicated the provision of competitively sensitive, but essential, information to other enrolled programmers."[60] These accusations are conclusory, and actually serve to demonstrate how BellSouth has attempted to manipulate its "open" video dialtone system into a packaged, tiered cable system.

The LECs do not say how or why Scripps' mere "presence as an enrolled programmer during preparation for the trial has greatly increased the difficulty of creating and maintaining a coalition of enrolled programmers for development of a competitive retail offering." Indeed, the statement exposes that BellSouth was impermissibly attempting to create "a coalition" of programmers. As the operator of an open video dialtone system, BellSouth is prohibited from engaging in packaging or tiering of programming for delivery to subscribers.[61] The Commission should particularly question why Scripps' lease of only 6 channels would make it difficult for BellSouth to create a coalition of programmers. The reason is likely that because Scripps has its own facilities, it was not entirely dependent on BellSouth for access to consumers, as independent programmers would be. Accordingly, BellSouth was not able to manipulate Scripps to comply with its wishes to create a "coalition." The questions raised by the LECs'

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[60] LECs' Comments at 15-16.

[61] *Video Dialtone Order*, 7 FCC Rcd. 5789, 5817, ¶69 (1992).

statement are particularly important considering that the Commission is considering unleashing exactly such an operation without oversight or constraint.

The LECs similarly fail to explain how or why Scripps' "participation has greatly complicated the provision of competitively sensitive . . . information to other enrolled programmers," any more than any other programmer that plans to use the platform, would impact on the distribution of competitive material. Presumably, on an open video or video dialtone system, intra-system competition between programmers would place all programmers on the system in competition against each other, as well as the local cable operator. Accordingly, the distribution of "competitively sensitive" material to the cable operator would do no greater harm that the material's distribution among competing programmers on the open system. Indeed, in the case of BellSouth's video dialtone system, the Commission must question what "competitively sensitive" material BellSouth wished to distribute to all programmers except Scripps, and whether such material was distributed to all but Scripps, thus discriminating against Scripps. Under the video dialtone requirements, BellSouth was required to charge rates for carriage pursuant to a publicly filed tariff. Accordingly, information regarding the pricing of BellSouth's capacity should not be "competitively sensitive," unless BellSouth was attempting to circumvent its obligation to utilize a tariff — which BellSouth never filed. What other "competitively sensitive" material could BellSouth need to distribute? Its application showed its planned construction area, and the actual construction schedule is easily observed. The technological parameters of its system would be of no particular competitive use to a cable operator, and likely would be commonly known in technological circles.